No. 48857-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Israel Toribio-Laureano,

Appellant.

Lewis County Superior Court Cause No. 13-1-00155-6

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Toribio-Laureano's convictions violated his Sixth and Fourteenth Amendment right to confront witnesses.
2. The trial court erred by admitting testimonial hearsay.

   ISSUE 1: The confrontation clause prohibits admission of testimonial hearsay unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. Did the admission of testimonial hearsay violate Mr. Toribio-Laureano's Sixth Amendment right to confront the witnesses against him?
3. The trial court erred by refusing to give Mr. Toribio-Laureano's proposed missing witness instruction.

   ISSUE 2: A missing witness instruction is appropriate when the witness is peculiarly available to the state, and it is reasonable to presume the absent witness would have provided damaging testimony. Where the prosecution failed to call or explain the absence of two informants who worked as state agents in pursuing Mr. Toribio-Laureano, did the trial court err by refusing to give a missing witness instruction?
4. The trial court improperly commented on the evidence.
5. The trial judge erred by notifying the jury he had adopted the state's proposed instructions.

   ISSUE 3: A judge may not instruct jurors in a way that conveys the judge's attitude toward the case. Did the trial judge improperly comment on the evidence by allowing jurors to infer his attitude toward the case?
6. The court erred by ordering Mr. Toribio-Laureano to pay discretionary legal financial obligations absent adequate inquiry into his ability to pay.

   ISSUE 4: A court may not order a person to pay discretionary legal financial obligations (LFOs) absent individualized inquiry into his ability to do so. Did the court err by ordering Mr. Toribio-Laureano to pay $2200 in discretionary LFOs without an adequate inquiry or finding relating to his ability to pay?

7. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

> **ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Toribio-Laureano is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jose Mendez Lopez and Debra Mendez were drug dealers. RP 27-28. They sold to police twice and were arrested. RP 27-28. As often happens, they sought to reduce the consequences by agreeing to do an additional drug deal for police. RP 27-30, 70.

Jose Mendez Lopez made a call and spoke in Spanish to the other party. He told the officer he had arranged a meeting. RP 30-31. The officer listened to the call but does not speak Spanish. RP 31.

Both Jose Mendez Lopez and Debra Mendez went to what they claimed would be the exchange location. RP 32-36. Neither wore wires. RP 80, 98. The supervising officers could not hear or record any of the alleged exchanges. RP 80.

Officers followed the informants to the location, and other officers were already there to follow the other party. RP 35-40, 103-110. After watching the car drive away, officers stopped the other car, which had two occupants. RP 103-106. Israel Toribio-Laureano was the driver of that car, and police arrested him and the passenger. RP 40, 106, 127. Officers found the buy money and additional methamphetamine in the car. RP 89-91, 106.

The state charged Mr. Toribio-Laureano with Delivery of a Controlled Substance and Possession with Intent to Deliver, both in a school zone.[1] CP 1-4. The court found Mr. Toribio-Laureano indigent and appointed an attorney to represent him. Order Appointing Counsel filed 3/74/13, Supp. CP.

At trial, neither informant testified. The state did not explain their absence. RP 20-188.

Officers told the jury they'd searched both Jose Mendez Lopez and Debra Mendez before and after the exchange. RP 33-34, 40. But officers did not perform strip searches or dog sniffs of either informant. RP 72-74, 126.

No officers testified that they saw an actual exchange between Mr. Toribio-Laureano and either of the two informants. RP 37, 88, 105, 125-126.

Over Mr. Toribio-Laureano's hearsay objection, the prosecutor introduced the out-of-court statements of Jose Mendez Lopez. RP 31-32. After his phone call in Spanish, he told police that he'd arranged to meet with his source, whom he knew as "Primo." RP 31.

[1] The enhancement on the possession with intent charge was withdrawn by the state during trial. RP 194-196.

At the conclusion of the evidence, the defense proposed a standard missing witness instruction. Counsel pointed out that neither informant had testified, and that the prosecution hadn't explained their absence. The court refused the instruction. CP 8; RP 200-203.

The packet of instructions sent to the jury room had a cover sheet reading "State's Proposed Jury Instructions". CP 10. The packet was signed and dated by the judge. CP 10.

The jury found Mr. Toribio-Laureano guilty of both drug offenses. CP 35-36. One of these carried the enhancement relating to a school zone.[2] CP 38. The court gave a sentence totaling 40 months. CP 42.

The court imposed discretionary legal financial obligations (LFOs) that included $600 for legal representation, a fine of $1000, a drug enforcement assessment of $500, and a lab fee of $100. CP 44. The only discussion at sentencing relating to the legal financial obligations was the defense attorney's comment that the state's request seemed "pretty standard."[3] RP 269. The court then found that Mr. Toribio-Laureano was still indigent and appointed an attorney for his appeal. Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense filed 6/28/13, Supp. CP; CP 50-52.

[2] As noted, the other enhancement was withdrawn. RP 194-196.

[3] This sentencing hearing took place in September of 2013, before recent Supreme Court decisions adjusting the approach to legal financial obligations.

This timely appeal followed. CP 49.

ARGUMENT

I. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. TORIBIO-LAUREANO'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI.[4] A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The core definition of testimonial hearsay includes statements "made under circumstances which

[4] This provision is applicable to the states through the due process clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52.

Confrontation issues may be raised for the first time on appeal, even absent any objection in the trial court.[5] RAP 2.5(a)(3); *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); *see also State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007), *overruled on other grounds by State v. Jasper,* 174 Wn.2d 96, 100, 271 P.3d 876 (2012).[6]

To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[7] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara,* 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the trial judge knew that the prosecution was seeking to admit testimonial hearsay implicating Mr. Toribio-Laureano, without any

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[5] In this case, defense counsel objected on hearsay grounds. This should be sufficient to preserve the confrontation error for review. If not, the error should be reviewed under RAP 2.5(a)(3), as argued here.

[6] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

[7] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

showing of unavailability or prior opportunity for cross-examination. Accordingly, the court "could have corrected" the problem. *Id.* The confrontation error can be reviewed on appeal, even if the hearsay objection below did not preserve it. *Id.*

B. The admission of testimonial hearsay violated Mr. Toribio-Laureano's confrontation rights.

Over defendant's hearsay objection, the prosecutor introduced the out-of-court statements of Jose Mendez Lopez. RP 31-32. He told police that he'd arranged to meet with his source, whom he knew as "Primo." RP 31. The statement falls within *Crawford's* core definition of testimonial hearsay. It was made by an informant, to police, under circumstances that would lead a reasonable person "to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52. Mr. Toribio-Laureano had no prior opportunity for cross-examination. The admission of this testimonial hearsay violated his Sixth and Fourteenth Amendment right to confront adverse witnesses. *Crawford,* 541 U.S. at 58-59.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption of prejudice, the state must establish beyond a reasonable

doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The state cannot make that showing. No direct evidence showed that Mr. Toribio-Laureano delivered drugs. The statement—that Mendez-Lopez "agreed to meet with [his] source"—suggested that Mr. Toribio-Laureano was a drug dealer who had provided Mendez-Lopez with drugs previously.

Without the evidence, a reasonable juror could have voted to acquit on the delivery charge. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT ERRED BY REFUSING TO GIVE MR. TORIBIO-LAUREANO'S MISSING WITNESS INSTRUCTION.

At trial, the state did not call either of the informants who actually participated in the alleged delivery. Instead, the prosecution relied entirely on the testimony of police officers who did not actually see the transaction

take place. RP 37, 88, 105, 125-126. Under these circumstances, Mr. Toribio-Laureano was entitled to a missing witness instruction.

The missing witness doctrine comes into play when the absence of a "natural witness" is not explained. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008); *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The doctrine may be invoked when there is "such a community of interest between the party and the witness… as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging." *State v. Blair*, 117 Wn.2d 479, 490, 816 P.2d 718 (1991).[8] A witness's availability "is to be determined based upon the facts and circumstances of that witness's relationship to the parties." *Cheatam*, 150 Wn.2d at 653 (internal quotation marks and citations omitted).

Thus, in *Cheatam,* for example, the defendant failed to call a witness who worked for his aunt. The witness was a natural witness for him, because she could have confirmed his alibi—that he'd been home at the time of the crime in that case. *Id.*, at 653-654. The Supreme Court

[8] The rationale for this requirement is that "a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be." *Id.*

found the doctrine applicable, and upheld the prosecutor's use of it in closing argument. *Id.*

Here, the two informants were natural witnesses for the state. They conducted the alleged purchase of drugs from Mr. Toribio-Laureano, and were the only ones with first-hand knowledge of any actual exchange. RP 37, 88, 105, 125-126.

The informants were police agents during the buy-bust. They were even more available to the state than the missing witness in *Cheatam*. *Id.* No explanation was provided for their absence.[9] Indeed, Detective Humphry testified that "the hope was that they would testify," but "there was nothing in writing, just a verbal agreement saying that they would testify." RP 93-94. He went on to say that they would not testify, but provided no explanation. RP 94. No explanation was offered to the court any other time during the trial. RP 20-188.

Under these circumstances, jurors should have been instructed on the missing witness doctrine. *Cheatam*, 150 Wn.2d at 652. The trial judge erred by refusing to give the instruction. *Id.* Mr. Toribio-Lauareano's

[9] The trial judge *sua sponte* decided the informants were "unavailable because of a potential Fifth Amendment issue." RP 200-201. This is incorrect. The informants may have been unavailable to testify about their own charges, but nothing prevented them from testifying about Mr. Toribio-Laureano's case. The buy-bust was set up by the police, and the informants faced no criminal liability for their cooperation. The prosecutor's concern—that their testimony would be "massively impeaching" if they later chose to testify in their own cases— was irrelevant speculation, insufficient to defeat Mr. Toribio-Laureano's right to the missing witness instruction. RP 201.

convictions must be reversed. *See State v. Johnson*, 40 Wn. App. 371, 379, 699 P.2d 221, 227 (1985) (discussing reversible error for an instruction on the jury's consideration of accomplice testimony) ; *see also State v. Fisher*, 185 Wn.2d 836, 374 P.3d 1185 (2016).

III. THE COURT'S INSTRUCTIONS COMMENTED ON THE EVIDENCE BECAUSE THEY ALLOWED JURORS TO INFER THE JUDGE'S ATTITUDE TOWARD THE CASE.

A statement is a judicial comment if the court's attitude can be inferred. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007). Here, the court provided jurors a signed instruction packet captioned "State's Proposed Jury Instructions." CP 10. This suggested that the judge favored the state's position over Mr. Toribio-Laureano's.

An improper judicial comment need not be expressly made; it is sufficient if it is implied. *Id.* A comment on the evidence "invades a fundamental right." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are presumed prejudicial and are only harmless if the record "affirmatively shows no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

Here, the record does not "affirmatively show that no prejudice could have resulted." *Id.* If jurors believed the judge supported the state,

there is a strong likelihood that they would have voted to convict based on that belief.

The court's instructions conveyed the judge's attitude toward the case. *Jackman*, 156 Wn.2d at 736, 744. The error violated Wash. Const. art. IV, §16, and is presumed prejudicial. *Id.* The record "does not affirmatively show that no prejudice could have resulted." *Id.* Mr. Ralls's conviction must be reversed. *Id.*

IV. THE SENTENCING COURT FAILED TO MAKE ANY PARTICULARIZED INQUIRY INTO MR. TORIBIO-LAUREANO'S PRESENT OR FUTURE ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

A. The case must be remanded for determination of Mr. Toribio-Laureano's ability to pay discretionary LFOs.

The legislature has mandated that a court "'*shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)) (emphasis in *Blazina*). This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

Mr. Toribio-Laureano's sentencing hearing took place before the Supreme Court decided *Blazina*. Indeed, it occurred prior to the Court of

Appeals' decision in *Blazina,* which has been cited as a basis for refusing to review the improper imposition of discretionary LFOs for the first time on appeal. *See, e.g., State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327, 329 (2015), *review granted, cause remanded,* 184 Wn.2d 1040, 365 P.3d 1263 (2016).

Here, the trial judge did no more than ask defense counsel to comment on the requested LFOs. RP 269. The court did not conduct the particularized inquiry required by the Supreme Court in *Blazina.* Nor did the court make any findings regarding Mr. Toribio-Laureano's ability to pay. *See* CP 42.

Nothing in the record suggests the court actually considered Mr. Toribio-Laureano's ability to pay. Furthermore, the court found him indigent before and after trial. In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

B. The Court of Appeals should review the erroneous imposition of discretionary legal financial obligations.

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, 182 Wn.2d at 835. The *Blazina* court found that "[n]ational and local cries for reform of

broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*[10] This court should follow the Supreme Court's lead and consider the merits of Mr. Toribio-Laureano's LFO claims even though they were not raised below. Review is especially warranted in this case because Mr. Toribio-Laureano was sentenced prior to the Supreme Court's *Blazina* decision.

The court erred by ordering Mr. Toribio-Laureano to pay discretionary LFOs absent any showing that he had the means to do so. *Blazina*, 182 Wn.2d at 838. The order imposing discretionary LFO's must be vacated and the case remanded for consideration of Mr. Toribio-Laureano's ability to pay. *Id.*

V. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

[10] The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85.

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016) *review denied,* 185 Wn.2d 1034 (2016).

Appellate costs are "indisputably" discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. Furthermore, "[t]he future availability of a remission hearing in a trial court cannot displace [the Court of Appeals'] obligation to exercise discretion when properly requested to do so." *Sinclair*, 192 Wn. App. at 388.

Mr. Toribio-Laureano was convicted of two felonies. CP 39. He was sentenced to 40 months in prison. CP 41. The trial court determined that he is indigent for purposes of this appeal. CP 50. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

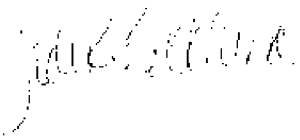
If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, Mr. Toribio-Laureano's convictions must be reversed and the case remanded for a new trial. In the alternative, the order imposing discretionary LFOs must be vacated. If the state substantially prevails, the Court of Appeals should decline to impose appellate costs.

Respectfully submitted on September 14, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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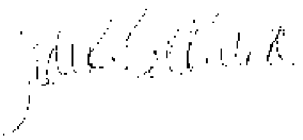
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 14, 2016.



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